

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
The Library of Congress
Washington, D.C.

In re

**DETERMINATION OF ROYALTY RATES AND
TERMS FOR MAKING AND DISTRIBUTING
PHONORECORDS (Phonorecords III)**

**Docket No. 16-CRB-0003-PR
(2018-2022) (Remand)**

**REPLY IN SUPPORT OF SERVICES' MOTION TO STRIKE
COPYRIGHT OWNERS' EXPERT TESTIMONY**

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The Copyright Owners repeatedly have manipulated the procedures in this remand. First, they argued that the Final Determination’s combination of rate increase and uncapped TCC prong was not disruptive to the Services’ businesses or the streaming industry, without producing any new evidence to support that proposition. Second, they argued that the Services had failed in their initial submission to address the disruptive impact, but nonetheless submitted *hundreds* of pages of new expert testimony purporting to rebut that non-existent showing. The Copyright Owners now argue that *all* of their last-minute expert testimony is permissible “rebuttal” testimony because it touches on “principles” or “subject matter” the Services discussed. But the Copyright Owners’ view of what constitutes proper rebuttal testimony is far broader than what the Judges have permitted before. Much of their experts’ testimony is designed to buttress the same arguments concerning disruption that the Copyright Owners raised in their direct case without any accompanying evidence and does not *rebut* any of the Services’ evidence. The Judges should strike the Copyright Owners’ untimely and misleading expert testimony or at least give the Services an opportunity to respond.

ARGUMENT

I. The Copyright Owners Mischaracterize the Applicable Legal Standard

While the Judges’ prior rulings suggest “a continuum” of permissible rebuttal testimony,¹ the Judges have made clear that rebuttal testimony must “set forth the counter-arguments and evidence [a participant] intends to offer to *rebut* the arguments and evidence proffered by the

¹ Order Denying Licensee Services’ Motion to Strike SoundExchange’s “Corrected” Written Rebuttal Testimony at 7, *Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings*, No. 14-CRB-0001-WR (2016-2020) (Apr. 2, 2015) (*Web IV* Order). This reply uses the same shorthand as the Motion and Opposition.

adverse parties.”² Rebuttal that “‘strays too far’ from the opposing party’s direct testimony,” including testimony offered merely to bolster a party’s direct case, falls on the wrong end of the continuum and is “inappropriate.” *Web IV* Order at 7; *see also 2000-03 CD* Order at 3-5; *SDARS II* Order at 2. In arguing that their new testimony falls on the right end, the Copyright Owners misrepresent an earlier *Phonorecords III* order and improperly rely on a standard governing *discovery*.

The Copyright Owners first claim (at 10) that rebuttal testimony is proper if it touches on “the principles or subject matter of the other participant’s proposal or submission.” They claim this exceedingly broad standard explains the Judges’ denial of their motion to exclude Amazon’s rebuttal testimony at an earlier phase. There, the Copyright Owners argued that Robert Klein’s testimony did “not rebut any proposition [they] put forth.” Klein Order at 2. Amazon responded that his testimony “provide[d] important empirical data to rebut the rate proposal put forward by the Copyright Owners in their direct case and the arguments they make to support it.” Amazon Opp’n at 2-4. The Judges denied the motion, stating that the testimony was “proper rebuttal of evidence adduced by the Copyright Owners as part of their direct case,” but did not otherwise explain their reasoning. Klein Order at 2. The Klein Order is thus far less sweeping than the Copyright Owners’ contend: It merely reflects agreement with Amazon that the Klein testimony was properly responding to the Copyright Owners’ arguments.³ The Copyright Owners’ proposed standard not only is untethered to the Klein Order, but also would replace the existing

² *2000-03 CD* Order at 3.

³ There is also no inconsistency between Amazon’s arguments there and the Services’ arguments here. Amazon showed that Mr. Klein’s report responded to the Copyright Owners’ direct case. Amazon Opp’n at 14. Here, by contrast, the Copyright Owners’ new testimony is *not* responsive to the Services’ direct case.

standard—that rebuttal testimony must *rebut* another party’s arguments or evidence—with a boundless standard that would open the floodgates to all manner of purported “rebuttal” testimony that merely touches on topics the opening submissions addressed.⁴

The Copyright Owners also argue (at 10-12) that their new expert testimony must be proper rebuttal insofar as it addresses material the Judges found to be “directly related” to the Services’ initial submission. But whether material is “directly related” to written testimony is the standard for permitting or compelling *discovery*. 37 C.F.R. § 351.5(b). The Judges’ ruling that certain of the Copyright Owners’ direct-phase *discovery requests* “directly related” to the Services’ witnesses’ testimony does not mean that any testimony that relates to that discovery is proper rebuttal. Even if discovery “directly relates” to an opposing party’s direct testimony, it does not follow that all expert opinions that reference that discovery properly *rebut* the same testimony. The Copyright Owners cite no order supporting their claim that the Judges’ finding that the Copyright Owners satisfied the former standard suffices to carry their burden on the latter standard. None exists.

II. The Copyright Owners Fail To Justify Dr. Eisenach’s Testimony

The Copyright Owners’ central argument in their initial submission was that the uncapped TCC prong did not cause “disruption” to the Services’ businesses or the streaming industry. Copyright Owners’ Opening Br. 55-68. The Copyright Owners concede (at 10) that Dr. Eisenach’s testimony “addresses” that very issue—“the question of disruption and impact on

⁴ The Copyright Owners also wrongly claim (at 10) that the *SDARS II* Order was invalidated by the subsequent Reiley Order. Not so. The Reiley Order did not overrule the *SDARS II* Order, but merely clarified that testimony may be proper rebuttal even where it also supports a party’s direct case. Reiley Order at 5. The Services are not arguing that the Copyright Owners’ testimony should be stricken because it *also* supports their initial submission, but because it *only* supports that initial submission.

the Services”—thereby acknowledging that his testimony is offered to support their direct case. Indeed, Dr. Eisenach devotes much of his “rebuttal” testimony to analyzing “the impact of the Phonorecords III Rates on the royalties paid by the Services” and opining “that the Phonorecords III Rates have not adversely affected the financial performance of the Services,” Eisenach Testimony ¶¶ 9, 11, but that is simply the Copyright Owners’ own argument from their direct case. *See* Copyright Owners’ Opening Br. 55-68.

The Copyright Owners contend (at 10) that it was “appropriate” to submit Dr. Eisenach’s opinions on this issue because those opinions are based on documents that “directly relate to the Services’ direct testimony.” As shown above, that is not the standard for rebuttal testimony. And the Copyright Owners simultaneously argue that there was no evidence for them to rebut, claiming that the Services’ direct remand submission “made no case for disruption or even material harm from the expanded use of the [uncapped] TCC prong.” Copyright Owners’ Reply Br. 35-36. The Copyright Owners never address this contradiction. Instead, they assert (at 12) that Dr. Eisenach’s testimony is proper simply because it contains “citations to the Services’ testimony.” But citations alone do not transform impermissible direct testimony into proper rebuttal.

The Copyright Owners also assert (at 12) that they “could not have predicted the testimony that the Service witnesses were going to proffer on direct.” But the Copyright Owners could have predicted the need “to present the information necessary to establish” their “direct case” that the uncapped TCC prong was not disruptive. *2000-03 CD* Order at 3. Indeed, after the Judges rejected the Copyright Owners’ proposal to defer all of their new evidence to the rebuttal phase, they *should* have predicted that need. Yet the Copyright Owners chose not to

submit new evidence in their initial submission. The Judges should not allow them to make “an untimely addition” to that submission now. *SDARS II* Order at 2.⁵

Finally, the Copyright Owners claim (at 3) that the Services’ motion is an effort “to suppress their own records.” That is false. The Services object to Dr. Eisenach’s improper *opinions* based on his *analysis* of those records, which the Copyright Owners obtained from the MLC and could have obtained *before* submitting their initial remand submission. Indeed, those facts undermine the Copyright Owners’ arguments in their motion to compel that discovery from the Services was necessary to obtain those records. The Copyright Owners say nothing about this, despite their decision to withhold Dr. Eisenach’s analysis until their rebuttal submission, denying the Services any opportunity to address the numerous flaws in his opinions. The Judges should strike Dr. Eisenach’s improper testimony.

III. The Copyright Owners Fail To Justify Professor Spulber’s Testimony

The Copyright Owners argue (at 14-15) that Professor Spulber’s testimony is proper rebuttal because it concerns the see-saw theory, which they claim was “*the Services’* core argument on direct.” But rebuttal testimony must do more than touch on a topic discussed in the other side’s direct case; it must “*rebut* the arguments and evidence proffered by the adverse parties.” *2000-03 CD* Order at 3. In the portions challenged, Professor Spulber does not rebut any specific arguments or evidence the Services proffered—he hardly mentions those arguments.

⁵ The Copyright Owners argue (at 9) that the Services’ rate proposal on remand was “unauthorized.” That is wrong and irrelevant. The D.C. Circuit “vacate[d] and remand[ed]” the “rate structure and percentages” that the Majority adopted, directing the Judges to reassess them on remand. *Johnson v. Copyright Royalty Bd.*, 969 F.3d 363, 381 (D.C. Cir. 2020). It was proper for the Services to propose regulatory language in connection with that reassessment. And that proposal provides no excuse for the Copyright Owners’ violation of the rules governing rebuttal testimony.

See Spulber Testimony ¶¶ 10-27, 53-71. Instead, his testimony is meant to “support[] the reasoning of the Board,” which the Copyright Owners have urged the Judges to reembrace on remand. *Id.* ¶ 18. Professor Spulber seeks only to buttress the Copyright Owners’ direct case. That is not proper rebuttal.

The Copyright Owners also do not address Professor Spulber’s discussion regarding sound recording licenses being “determined through negotiation,” Mot. 10-11, and have waived any objection to striking paragraphs 10-17 of that testimony. *See, e.g., Wannall v. Honeywell, Inc.*, 775 F.3d 425, 428 (D.C. Cir. 2014) (“[I]f a party files an opposition to a motion and therein addresses only some of the movant’s arguments, the court may treat the unaddressed arguments as conceded.”).

Finally, the Copyright Owners do not seriously defend Professor Spulber’s opinions on whether record companies constitute a complementary oligopoly. *See* Mot. 12-13 & n.4. The Copyright Owners assert (at 12) that his testimony “*directly relates* to the Services’ direct testimony,” but they cannot identify where the Services’ experts opined on this issue. The portions of the Services’ expert reports Professor Spulber cited merely repeated the Judges’ finding (which the D.C. Circuit affirmed) and treated it as the law of the case. *See* Mot. 12 n.4. The Judges should strike the challenged portions of Professor Spulber’s testimony.

IV. The Copyright Owners Fail To Justify Professor Watt’s Testimony

The Copyright Owners contend (at 13) that Professor Watt’s testimony is permissible because it responds to the Services’ argument that “the Majority got it *wrong*.” The Services’ argument that the Majority was wrong, however, does not open the door to any and all testimony arguing that “the Majority got it right.” That standard would permit unlimited rebuttal, particularly where, as here, the Copyright Owners ask the Judges to reinstate the same rates and

structure based on the same reasoning as the Final Determination. Portions of Professor Watt's testimony purport to restate and summarize the Majority's bargaining theory analysis, while other portions assert that the Majority was correct, without responding to any points the Services' testimony raised. *See* Watt Testimony, Part IV(A)-(B). Because rebuttal testimony must "*rebut* the arguments and evidence proffered by the adverse parties," 2000-03 CD Order at 3, the Judges should strike those portions of Professor Watt's testimony that fail to do so, and those that rely on the improper Eisenach testimony.

V. In the Alternative, the Judges Should Allow the Services To Respond

By withholding all new evidence supporting their direct case until rebuttal, the Copyright Owners prejudiced the Services, which have no opportunity to respond to hundreds of pages of inaccurate and misleading opinion testimony. The Copyright Owners also deprived the Judges of a comprehensive record. Although it would not fully cure the prejudice to the Services, the Judges should allow the Services to respond to the Copyright Owners' improper testimony if they do not strike it.

The Copyright Owners assert (at 16-19) that no such response is needed. But their defense of the substance of their experts' new testimony highlights the need for a full record if the Judges allow the improper evidence. For example:

- The Copyright Owners do not defend Dr. Eisenach's cherry-picking of Amazon data to overstate [REDACTED]. Instead, they try (at 13) to characterize [REDACTED].
[REDACTED] See Mot. 16-17.
- The Copyright Owners do not defend Dr. Eisenach's failure to distinguish between the impact of *Phonorecords III* on [REDACTED].
[REDACTED] There is no need for more disaggregated data to present an accurate picture. The royalty rates for [REDACTED]

[REDACTED]

- Nor do the Copyright Owners defend Dr. Eisenach’s failure to acknowledge that [REDACTED] shown in his analysis occurred not because [REDACTED].” Had the Copyright Owners properly presented Dr. Eisenach’s testimony in their initial submission, the Services could have addressed those other factors.
- The Copyright Owners do not respond to the substance of the Services’ criticism of Dr. Eisenach’s analysis of [REDACTED] royalty rates—including that Dr. Eisenach [REDACTED]. Instead, the Copyright Owners make an ad hominem argument concerning [REDACTED].

These points all highlight why the Copyright Owners’ strategy of saving all new evidence for the rebuttal round is so detrimental: If raised at the appropriate time, Dr. Eisenach’s analysis and data could have been fully vetted.

CONCLUSION

The Judges should grant the motion to strike or, in the alternative, allow the Services to submit written surrebuttal testimony and a surreply brief.

PUBLIC VERSION

August 17, 2021

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**Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
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In re

**DETERMINATION OF ROYALTY RATES AND
TERMS FOR MAKING AND DISTRIBUTING
PHONORECORDS (Phonorecords III)**

**Docket No. 16-CRB-0003-PR
(2018-2022) (Remand)**

**DECLARATION AND CERTIFICATION OF AARON J. CURTIS
REGARDING RESTRICTED PROTECTED MATERIAL**

**(On behalf of Amazon.com Services LLC, Google LLC,
Pandora Media, LLC, and Spotify USA Inc.)**

1. I am counsel for Pandora Media, LLC in the above-captioned case. I respectfully submit this declaration and certification pursuant to the terms of the Protective Order issued July 27, 2016 (the “Protective Order”). I have prepared this declaration after consultation with counsel for Amazon.com Services LLC, Google LLC, and Spotify USA Inc. (collectively, with Pandora Media, LLC, the “Services”), and am authorized to submit this declaration on their behalf.

2. I have reviewed the Reply in Support of Services’ Motion to Strike Copyright Owners’ Expert Testimony (the “Reply Brief”). Portions of the Reply Brief contain information that the Participants have designated as “Restricted” under the Protective Order (the “Protected Material”). The Protected Material is shaded in grey highlight in the restricted e-filing of the Reply Brief, and is fully redacted in the public e-filing of the Reply Brief.

3. The Protected Material includes testimony and legal argument involving (a) contracts and contractual terms (including the negotiation thereof) that are not available to the public, highly competitively sensitive and, at times, subject to express confidentiality provisions

with third parties; and (b) highly confidential internal business information, financial projections, financial data, negotiation correspondence, and competitive strategies that are proprietary, not available to the public, and commercially sensitive.

4. If this contractual, commercial, or financial information were to become public, it would place the Services at a commercial and competitive disadvantage, unfairly advantage other parties to the detriment of the Services, and jeopardize their business interests. Information related to confidential contracts or relationships with third-party content providers could be used by the Services' competitors, or by other content providers, to formulate rival bids, bid up Service payments, or otherwise unfairly jeopardize the Services' commercial and competitive interests.

5. The contractual, commercial, and financial information described in the paragraphs above must be treated as Restricted Protected Material in order to prevent business and competitive harm that would result from the disclosure of such information while, at the same time, enabling the Services to provide the Copyright Royalty Judges with the most complete record possible on which to base their determination in this proceeding.

Pursuant to 28 U.S.C. § 1746, I hereby declare under the penalty of perjury that, to the best of my knowledge, information, and belief, the foregoing is true and correct.

Dated: August 17, 2021
New York, NY

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Proof of Delivery

I hereby certify that on Tuesday, August 17, 2021, I provided a true and correct copy of the
REPLY IN SUPPORT OF SERVICES' MOTION TO STRIKE COPYRIGHT OWNERS' EXPERT
TESTIMONY (PUBLIC) to the following:

National Music Publishers' Association (NMPA) et al, represented by Benjamin Semel,
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Nashville Songwriters Association International, represented by Benjamin K Semel, served
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Johnson, George, represented by George D Johnson, served via ESERVICE at
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Signed: /s/ Todd Larson